(2)

89-373

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 6, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

69p

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 475—August Term, 1988

(Argued November 30, 1988 Decided March 22, 1989)

Docket No. 88-6142

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND,

Plaintiffs,

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA,

Plaintiffs-Appellants,

—v.—

LEE M. THOMAS, Administrator of the U.S. Environmental Protection Agency, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees,

ALABAMA POWER COMPANY, et al., PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO INCORPORATED, MAGMA COPPER COMPANY,

Intervenors-Appellees.

Before:

VAN GRAAFEILAND, WINTER and MAHONEY,
Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York (David N. Edelstein, *Judge*), holding that Section 304 of the Clean Air Act did not confer jurisdiction on the district court to order the Administrator of the Environmental Protection Agency to revise federal standards for the presence in the ambient air of certain pollutants. We hold that the district court does have jurisdiction but believe subsequent actions of the Administrator have begun the required rulemaking.

Reversed and remanded. Judge Mahoney dissents in a separate opinion.

DAVID R. WOOLEY, Assistant Attorney General, State of New York (Robert Abrams, Attorney General of the State of New York, Peter R. Schiff, Assistant Attorney General of New York, of counsel),

JAMES T. B. TRIPP, Environmental Defense Fund, New York, New York (Robert E. Yuhnke, Environmental Defense Fund, Boulder, Colorado, of counsel),

David Hawkins, Natural Resources Defense Council, Washington, D.C.,

Howard Fox, Sierra Club Legal Defense Fund, Washington, D.C.

Hubert H. Humphrey III, Attorney General of the State of Minnesota (Ann Seha, Special Assistant Attorney General, State of Minnesota, of counsel),

Jeffrey L. Amestoy, Attorney General of the State of Vermont (J. Wallace Malley, Jr., Assistant Attorney General, State of Vermont, of counsel),

Joseph I. Lieberman, Attorney General of the State of Connecticut (Brian Comerford, Assistant Attorney General, State of Connecticut, of counsel),

Stephen Merrill, Attorney General of the State of New Hampshire, (George Dana Bisbee, Assistant Attorney General, State of New Hampshire, of counsel),

James M. Shannon, Attorney General of the Commonwealth of Massachusetts (Lee Breckenridge, Assistant Attorney General, Commonwealth of Massachusetts, of counsel), *for Plaintiffs-Appellants.*

JACQUES B. GELIN, Department of Justice, Washington, D.C. (Myles E. Flint, Deputy Assistant Attorney General, Michael A. McCord, Robert L. Klarquist, Department of Justice, Gerald K. Gleason, U.S. Environmental Protection Agency, Washington, D.C., of counsel), *for Defendants-Appellees.*

HENRY V. NICKEL, Washington, D.C. (Michael L. Teague, F. William Brownell, Norman W. Fichthorn, Hunton & Williams, Washington, D.C., Alfred V.J. Prather, Edwin H. Seeger, Kurt E. Blase, Prather, Seeger Doolittle & Farmer, Washington, D.C., Michael S. Devorkin, John Jacob Rieck, Jr., Doar Devorkin & Rieck, New York, New York, Vincent R. Fitzpatrick, Jr., Margaret Murphy, White & Case, New York, New York, Nancy C. Shea, James R. Bieke, Bruce C. Swartz, Shea & Gardner, Washington, D.C., of counsel), *for Intervenors-Appellees.*

WINTER, *Circuit Judge*:

This appeal involves the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (1982 and Supp. IV 1986) ("the Act"), and in particular its bifurcated jurisdictional scheme for judicial review of decisionmaking by the Environmental Protection Agency ("EPA"). The Act provides that suits to compel the Administrator to perform non-discretionary

duties may be brought only in district courts, while petitions seeking review of the Administrator's discretionary actions must be brought in the Court of Appeals for the District of Columbia. *See, e.g., Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 268 (N.D. Ill. 1981). Jurisdiction under the Act thus turns on the threshold question of whether the administrator's challenged action (or inaction) is discretionary or non-discretionary.

In the instant appeal, a number of environmentalist groups, along with six states, have challenged the Administrator's failure to revise the "National Ambient Air Quality Standards" ("NAAQS") for sulphur oxides ("SOx"). SOx are causative agents of both acid rain and dry acid deposition—phenomena we will refer to collectively as "acid deposition." Judge Edelstein held that the Administrator's authority to revise those NAAQS is discretionary and that the district court therefore did not have jurisdiction to entertain the suit. *Environmental Defense Fund v. Thomas*, 85 Civ. 9507 (S.D.N.Y. April 19, 1988). Although we agree that the Administrator has discretion to decide on the precise form and substance of the NAAQS at issue, we believe that under the circumstances the Administrator has a non-discretionary duty to make *some* formal decision whether to revise those NAAQS. Subsequent published actions by the Administrator have begun the process of decisionmaking, however, and we remand so the district court may enter an order that the rulemaking be continued to final decision.

BACKGROUND

The Clean Air Act was first passed in the 1960's and has since undergone two major legislative overhauls. The first of these overhauls, in 1970, established a multi-stage process for EPA evaluation of potential air pollutants. In the first stage, the EPA was, after scientific study, to publish "criteria" for the evaluation of any given potential pollutant. Section 108 of the Act, 42 U.S.C. § 7408

(1982). After the establishment of these "criteria," the EPA was to publish two types of initial NAAQS pursuant to Section 109 of the Act, 42 U.S.C. § 7409 (1982): (i) primary ambient air quality standards, designed to "protect the public health"; and (ii) secondary ambient air quality standards, designed to "protect the public welfare from any known or anticipated adverse effects associated with the presence of [a given] air pollutant in the ambient air." 42 U.S.C. § 7409(b).

The 1970 amendments distinguished between pollutants for which criteria had been announced before 1970 and pollutants for criteria were announced after 1970. In the case of pollutants for which criteria had been announced before 1970 (which included SOx), Sections 109(a)(1)(A) and (B) required the EPA to issue proposed initial primary and secondary NAAQS within 120 days of the passage of the 1970 amendments. In the case of pollutants for which criteria were announced after 1970, the amendments required the EPA to issue proposed initial primary and secondary NAAQS simultaneously with its publication of "criteria." The 1970 amendments added that both primary and secondary NAAQS "may be revised in the same manner as promulgated." 42 U.S.C. §§ 7409(b)(1) and (2).

The 1970 amendments also introduced into the statute a bifurcated jurisdictional scheme. In Section 307 of the Act, the 1970 amendments vested the Court of Appeals for the District of Columbia with exclusive jurisdiction to review a variety of rule promulgations and other "final actions" by the Administrator. 42 U.S.C. § 7607(b)(1982). In addition, Section 304 of the Act, the so-called "Citizen Suits" provision, permits any person to bring a civil action in a district court "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . ." 42 U.S.C. § 7604(a)(2) (1982).

The second statutory overhaul occurred in 1977. These amendments added Section 109(d) concerning the "review and revision" of NAAQS, which provides that:

> [n]o later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under Section 108 . . . and promulgate such new standards as may be appropriate . . . . The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

42 U.S.C. § 7409(d) (1982). It is this section that plaintiffs seek to enforce by this action under Section 304.

The pollutants involved in this appeal, SOx, are causative or acid deposition and belong to the class of pollutants for which criteria had been issued before the 1970 amendments. In 1971, the Administrator promulgated primary and secondary NAAQS for SOx. 36 Fed. Reg. 8186. The secondary NAAQS were reviewed by the Court of Appeals for the District of Columbia and were thereafter remanded to the Administrator with instructions to elaborate on their justification. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). On that remand, the Administrator modified the secondary NAAQS. 38 Fed. Reg. 25679 (1973). The secondary NAAQS as modified were not designed to protect against the deleterious effects of SOx associated with acid rain and dry acid deposition—deleterious effects on water quality, wildlife, soils and forests, and corrosive effects of SOx on building materials, monuments and products. 38 Fed. Reg. 25680 (1973). Neither the primary SOx NAAQS as promulgated in 1971, nor the modified secondary SOx NAAQS of 1973, have been revised since.

In 1979, the Administrator undertook a review of the air quality criteria for SOx in response to the passage of Section 109(d)(1) in 1977. 44 Fed. Reg. 56731 col.

2 (1979). In 1982, that review resulted in the publication of new criteria both for SOx and for particulate matter, another pollutant, which includes forms of SOx, listed under Section 108. The new criteria described in some detail the ill effects associated with acid deposition. The Administrator did not, however, issue revised NAAQS for SOx. Indeed, the Administrator took no official public action, neither revising the existing standards nor formally declining to revise them. In 1984 and 1985, the EPA issued a three-volume "Critical Assessment" on the acid deposition effects of SOx. This did not constitute a formal revision of the SOx criteria, and the Administrator again took no action in conjunction with the issuance of this "Critical Assessment."

In 1985, appellants brought the instant case in the District Court for the Southern District of New York, pursuant to Section 304, the "Citizen Suits" provision of the Act, to compel the Administrator to promulgate revised NAAQS for SOx. Their complaint alleged that the revised criteria of 1982 and the "Critical Assessment" of 1984 and 1985 constituted a formal finding that SOx caused acid deposition threatening to the public health and welfare. Appellants claimed that those findings imposed on the Administrator a non-discretionary duty to revise the NAAQS for SOx, pursuant to Sections 109(b) and 109(d), in order to combat such health and welfare effects. Judge Edelstein disagreed. Looking to the language of Section 109(d), he concluded that the section created a mandatory duty only to revise pollutant criteria —an action the Administrator had taken in 1982. The Administrator, he held, had discretion not to revise the SOx NAAQS if he so chose. Because the duty to revise the NAAQS was discretionary, he concluded that the district court lacked jurisdiction over the dispute and dismissed the complaint.

One week after Judge Edelstein's decision, the EPA issued a "Proposed Decision Not To Revise the National

Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)." 53 Fed. Reg. 14926 (April 26, 1988). In that "Proposed Decision," the Administrator announced that he was formally "propos[ing] not to revise [the primary and secondary] standards" for sulfur oxides, 53 Fed. Reg. at 14926 col. 1, and invited comments. However, the Administrator expressly excluded the problem of acid deposition from the list of welfare effects for which no revision of the secondary SOx NAAQS was necessary:

> 1. Based upon the current scientific understanding of the acid deposition problem, it would be premature and unwise to prescribe any regulatory control program at this time.
>
> 2. When the fundamental scientific uncertainties have been reduced through ongoing research efforts, EPA will craft and support an appropriate set of control measures.

Id. at 14936 col. 1. In light of this EPA action, appellants have narrowed their claim on appeal. Rather than challenging both the primary and secondary NAAQS, they abandoned the challenge to the primary NAAQS, which the Administrator has formally proposed not to revise in his "Proposed Decision," and limited their appeal to a challenge to the secondary NAAQS, the revision of which the Administrator has declared to be "premature and unwise."

DISCUSSION

Section 304 grants jurisdiction to district courts to compel the Administrator to perform non-discretionary statutory duties. *Cf. Council of Commuter Org. v. Metropolitan Transp. Auth.*, 685 F.2d 663, 665 (2d Cir. 1982). Section 307 grants exclusive jurisdiction to the Court of Appeals for the District of Columbia over "final" and other actions of the EPA. Because Section 307 embodies a grant of exclusive jurisdiction, it appears that if the

District of Columbia has jurisdiction over the present action, the district court does not. *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981). If the District of Columbia Circuit does not have jurisdiction, however, then either the district court has jurisdiction or appellants have no forum in which to assert their claims.

Appellants take the position that the district court has jurisdiction and must order the Administrator to revise the secondary NAAQS. Appellees argue that the Administrator may stand pat, deciding neither to revise the NAAQS nor to make a public decision that revision is unnecessary. In their view, such a non-decision is unreviewable by the Court of Appeals for the District of Columbia under Section 307 because it involves no decision or other agency "action" and is also invulnerable to challenge in district courts under Section 304 because it is discretionary. We disagree with both parties.

In view of the revised criteria and "Critical Assessment," we believe the Administrator must make *some* decision regarding the revision of the NAAQS that is thereafter reviewable under Section 307 in the Court of Appeals for the District of Columbia. Because the duty to make *some* decision is non-discretionary, it is enforceable Under Section 304 in the district courts. Appellants argue that in the present case a revision is mandatory and should be ordered by the district court. The substance of the Administrator's decision is beyond the power of the district court, however, its authority being limited to ordering the Administrator to make a formal decision. Were we to order a revision, we would have to set out criteria governing that revision, and the district court would potentially have to apply those criteria in an enforcement proceeding. An order to revise would thus plunge the district court into the merits, matters that are the exclusive province of the District of Columbia Circuit. We appreciate that this distinction is some-

what artificial but believe it is necessary to confine the district court's authority and to defer to the authority of the District of Columbia Circuit. The April 26, 1988 "Proposed Decision Not To Revise," however, has begun the formal process of decisionmaking, and we remand for entry of an order directing that process to continue.

Our analysis begins with an examination of the jurisdiction of the Court of Appeals for the District of Columbia. In *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), that court held that "a challenge to the Administrator's refusal to revise a standard of performance is in effect a challenge to the standard itself and so can be brought only in this court under Section 307(b)(1) of the Clean Air Act . . . ." *Id.* at 656. This language suggests that the District of Columbia Circuit has exclusive jurisdiction over the instant matter. The categorical language of *Oljato* is, however, misleading. *Oljato* involved Section 111 of the Act, which, at that time, included language permitting, but not requiring, the Administrator to revise the "standards of performance" for new statutory sources of air pollution. Because the statute included no stated deadlines for revision of the standards in question, the *Oljato* court could reasonably treat the decision to revise or not to revise as one wholly within the discretion of the Administrator. Since *Oljato*, however, the District of Columbia Court has distinguished between those revision provisions in the Act that include stated deadlines and those that do not, holding that revision provisions that do include stated deadlines should, as a rule, be construed as creating nondiscretionary duties. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). Section 109(d), the provision at issue here, includes a stated deadline of "[n]ot later than December 31, 1980, and at five-year intervals thereafter." *Oljato* thus does not apply.

The District of Columbia Circuit has also held that it may review agency inaction under the Administrative

Procedure Act where the agency has unreasonably delayed in performing a duty over which the District of Columbia Circuit would have jurisdiction after final action under the Act. *Sierra Club*, 828 F.2d at 795-96. Thus, the District of Columbia Circuit arguably has jurisdiction on the grounds that the EPA has unreasonably delayed its decision whether or not to revise the secondary NAAQS for SOx. The District of Columbia Circuit was careful in *Sierra Club*, however, to limit its exclusive jurisdiction to cases involving "a right the denial of which we would have jurisdiction to review upon final agency action but the integrity of which might be irreversibly compromised by the time such review would occur." *Id.* at 796. Appellants' claimed right in the instant case is not one whose integrity is likely to be "irreversibly compromised." We therefore conclude that the instant action does not raise a claim within the exclusive grant of jurisdiction to the District of Columbia Circuit under Section 307.[1]

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[1] Our dissenting colleague argues that the District of Columbia Circuit has exclusive jurisdiction pursuant to the petitioning procedure outlined by way of dictum in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 & 667 n.20 (D.C. Cir. 1975). We disagree. Because *Oljato* was decided before the enactment of Section 109(d), the *Oljato* court was interpreting a version of the Act that included no provision for the revision of NAAQS. The *Oljato* dictum was based on a Senate Report that, in proposing section 307, referred to "new information [which] will be developed and [which] may dictate a revision or modification of any promulgated standard or regulation established under the act." *Oljato* thus stated that suits involving such "new information . . . [which] may dictate a revision of modification" were subject to its exclusive jurisdiction. *Oljato*, 515 F.2d at 660-61 (quoting S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41-42 (1970)). The *Oljato* court thus first determined that section 307 was the relevant jurisdictional provision, and then outlined a petitioning procedure for satisfying the requirements of that section. We, by contrast, have determined that section 304 is now the relevant statutory provision. The dictum in *Oljato* was made obsolete after the statutory overhaul that produced Section 109(d). Because the statute now expressly provides for the revision of standards, the problem of "new informa-

Having determined that the District of Columbia Circuit does not have exclusive jurisdiction, we now address what mandatory or, as the case may be, discretionary duties are created by the following language of Section 109(d) of the Act. To repeat, that section states in pertinent part:

> [n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 . . . and promulgate such new standards as may be appropriate . . . . The Administrator may review and revise criteria or promul-

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tion . . . [which] may dictate a revision or modification" has now been addressed by Congress and the Act includes mandatory language that necessarily alters the jurisdictional scheme.

We also note here our disagreement with our colleague's reading of *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). While it is true that *Sierra Club* states that "a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline," *id.* at 791 (quoting *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)), that holding is not at odds with our ruling in this case. The statutory provision at issue here, Section 109(d), reads: "[n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria . . . and promulgate such new standards as may be appropriate . . . ." Our colleague argues that this provision does not require that *all* specified action be completed within the stated deadline—i.e., the Administrator is left to exercise his "appropriate" discretion as to whether or not to revise. This argument is, however, not inconsistent with our holding. We believe that the "specified action" under this section is the making of *some* decision within the stated deadlines, whether to revise new standards or not to revise. To the extent that the "specified action" is simply the making of *some* decision, *all* specified action *is* required to be completed within a stated deadline—and, indeed, a stated deadline very close in language and meaning to the stated deadline in the *Train* case, in which the D.C. Circuit first announced its rule. *See Train*, 510 F.2d at 697 (interpreting statutory language requiring promulgation of regulations and guidelines "within one year of enactment of this title . . . .").

> gate new standards earlier or more frequently than required under this paragraph.

Clearly this section includes both mandatory ("shall complete," "required") and non-mandatory language ("as may be appropriate"). Appellees rely on the phrase "as may be appropriate," arguing that Judge Edelstein was correct in holding that that language confers on the Administrator a wholly discretionary authority to revise the NAAQS, not to revise them, or simply not to address the issue with a formal public opinion. Appellants argue that, as a matter of statutory construction, Section 109 (d) must be interpreted in light of the mandatory language of Sections 109(a) and (b). Section 109(a), which requires the initial promulgation of NAAQS, contains clearly mandatory language directing the Administrator to issue NAAQS within 120 days for those pollutants for which criteria had been published before 1970 and to issue proposed NAAQS simultaneously with the publication of criteria for newly identified pollutants. Appellants argue that Section 109(d) should be read in light of this clearly mandatory language.

We find this argument unpersuasive. Section 109(d) contains no cross-reference to Section 109(a). Moreover, it is difficult to perceive why the standard for promulgation of initial NAAQS should be identical to that for revised NAAQS. Congress could have repeated the mandatory language of Section 109(a) in Section 109 (d), but did not do so. Appellants also argue that Section 109(d) should be read in light of Section 109(b)(2), which declares that secondary NAAQS "shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare . . . ." Section 109(d) does include a cross-reference to Section 109(b). Because Section 109(b)(2) expressly entrusts the substance of secondary NAAQS to the "judgment of the Administrator," it is difficult to read it as imposing non-

discretionary duties. Furthermore, that section adds that secondary NAAQS "*may* be revised in the same manner as promulgated" (emphasis added). This permissive language suggests that, contrary to appellants' contention, the Administrator has discretion not to follow the procedures for issuing initial NAAQS when revising NAAQS. Harmonizing Section 109(d) with Section 109 (b) thus does nothing to further appellants' case.

Appellants also contend that language of Section 109 (d) itself, read in isolation, imposes a mandatory duty to revise the NAAQS. The phrase "as may be appropriate," they argue, is subject to the section's command that the Administrator "*shall* make . . . revisions." Under this view, the district court has jurisdiction to order the Administrator to make appropriate revisions in the NAAQS—power in short to issue orders affecting the substance of revised NAAQS. Again we disagree. The words "as may be appropriate" clearly suggest that the Administrator must exercise judgment and the presence of "shall" in the section implies only that the district court has jurisdiction to order the Administrator to make *some* formal decision whether to revise the NAAQS, the content of that decision being within the Administrator's discretion and reviewable only in the District of Columbia Circuit. *Cf. Natural Resources Defense Council v. New York State Dept. of Envtl. Conservation*, 87 Civ. 0505 (MEL) (S.D.N.Y. November 21, 1988).

Appellants advance a final argument, based on our caselaw. Conceding *arguendo* that the "as may be appropriate" language creates only discretionary authority, they contend that the district court has jurisdiction to compel the Administrator to revise its secondary NAAQS, the content of the revision being left to the Administrator. Under this view, the Administrator does not have power to decide not to revise. This argument is based on *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976), which involved Section 108 of the Act. Section 108 requires the Administrator

to evaluate potential air pollutants and then to publish a list of those which "endanger public health or welfare," employing the following language:

> (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
>
> (A) emissions of which in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. . . .

In *Train*, the EPA had evaluated lead, and conceded that lead met its standard for pollutants that "endanger [the] public health or welfare." It refused, however, to include lead on its list of pollutants. The *Train* plaintiffs brought suit, under Section 304, the "Citizen Suits" provision, seeking to compel the EPA to include lead on its pollutant list. In agreeing with the plaintiffs, we reasoned that the EPA had a non-discretionary duty to list lead, noting that the language of Section 108 was clearly mandatory and that the EPA had concededly found lead to "endanger public health or welfare." Because the duty to list lead was not discretionary in light of the finding of harmfulness, we held that the district court had jurisdiction to hear the suit and ordered the Administrator to include lead on his list of pollutants.

Appellants contend that *Train* requires a similar result in the instant case. They observe that the EPA's revised criteria of 1982 and its "Critical Assessment" of 1984-1985 both acknowledge the adverse effects of SOx-caused acid deposition. The published acknowledgements of those adverse effects are, appellants argue, the equivalent of the EPA's explicit concession in *Train* concerning the adverse effects of lead. The 1982 criteria and the "Critical Assessment" constitute, in effect, a formal declara-

tion that revision of the SOx NAAQS is "appropriate" according to the terms of Section 109(d). In their view, the Administrator has thus already exercised his discretion, impliedly found revision to be "appropriate," and now has a non-discretionary duty, enforceable in the district court, to revise the NAAQS in line with his revised criteria.

This argument did not persuade Judge Edelstein, and it does not persuade us. Even if we were to treat the EPA's revised criteria of 1982 and its "Critical Assessment" of 1984-1985 as equivalent to the concession of the harmful effects of lead that underlay our holding in *Train*—and it is far from clear that we should do so, *cf. National Resources Defense Council, Inc. v. Thomas*, 689 F. Supp. 246, 254-56 (S.D.N.Y. 1988)—*Train* is still distinguishable from the present case. The duty at issue in *Train* was a thoroughly ministerial one. We did no more than affirm an order compelling the EPA to include "lead" on a list and to issue some NAAQS for lead. We did not, however, specify the content of those NAAQS. *Train*, 545 F.2d at 328. *Train* thus stands solely for the proposition that the district court has jurisdiction, under Section 304, to compel the Administrator to perform purely ministerial acts, not to order the Administrator to make particular judgmental decisions. An order in the instant case to the Administrator to revise the NAAQS for SOx would be essentially meaningless and unenforceable unless it also directed that he revise those NAAQS in a particular manner. Formulating the details of substantive NAAQS, however, clearly requires the sort of scientific judgment that is the "hallmark" of agency discretion, *Kennecott Copper Corp., Nevada Mines v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), and is exclusively within the jurisdiction of the District of Columbia Circuit.

However, if *Train* does not justify all of the relief that appellants seek, that is not to say that it does not justify any relief at all. Although the district court does not have jurisdiction to order the Administrator to make a particular revision, we cannot agree with appellees that the Administrator may simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion. The 1982 criteria and the 1984-1985 "Critical Assessment" triggered a duty on the part of EPA to address and decide whether and what kind of revision is necessary. The district court thus does have jurisdiction to compel the Administrator to make *some* formal decision as to whether or not to revise the secondary NAAQS. *Cf. Natural Resources Defense Council v. New York State Dep't of Envtl. Conservation, supra.*

This reading of *Train* comports with our reading of the presence of both "shall" and "may" in Section 109 (d). It also comports with the legislative history of Section 109(d). As the House Report stated,

> The Administrator is . . . *required* to promulgate new standards and revise existing standards as are appropriate under the terms of section 109(b) of the act.

H.R. No. 294, P.L. 95-95, 1977 U.S. Code Cong. & Admin. News 1261 (emphasis added). We recognize, of course, our obligation to defer to agency statutory construction where Congress's intent is not clear. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, *rehearing denied*, 468 U.S. 1227 (1984). Here, however, Congress's intent that the Administrator make *some* decision is clear.

Accordingly, we hold that, while the district court did not have jurisdiction to compel the Administrator to revise the NAAQS, it did have jurisdiction to compel the Administrator to take some formal action, employing rulemaking procedures, *see Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), either revising the NAAQS or declining to revise them.

However, the Administrator's "Proposed Decision Not To Revise" of April 26, 1988, inviting comments on his determination that a decision as to the advisability of revising the secondary NAAQS for acid deposition "would be premature and unwise," is a required procedure in the course of reaching a formal decision. If this process continues, and a formal decision is rendered, appellants will have obtained all the relief to which they are entitled in a Section 304 action. Whether the decision when reached is wrong on the merits—even egregiously wrong —will be for the District of Columbia Circuit to resolve. We remand so the district court can enter an order directing the Administrator to continue the rulemaking to formal decision.

Reversed and remanded.

MAHONEY, Circuit Judge, dissenting:

I respectfully dissent, and would affirm the district court's determination that it lacked subject matter jurisdiction.

I do not agree with my colleagues that affirmance would leave a "bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." Rather, I would think the procedure outlined in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), was available to the plaintiffs here. Specifically:

> (1) The person seeking revision of a standard of performance, or any other standard reviewable under Section 307, should petition EPA to revise the standard in question. The petition should be submitted together with supporting materials, or references to supporting materials.
>
> (2) EPA should respond to the petition and, if it denies the petition, set forth its reasons.
>
> (3) If the petition is denied, the Petitioner may seek review of the denial in this court pursuant to Section 307.

Id. at 666.[1]

The quite limited role of a district court in the *Oljato* scheme is stated in the following terms:

> The Administrator's *failure to respond or inadequacy of response* may be appealable to the District Court

[1] Footnote 1 of the majority opinion states that the "statutory overhaul that produced section 109(d)" rendered the *Oljato* procedure "obsolete." I see no indication in the pertinent language or legislative history that any such result was intended, either with respect to section 109(d) or more generally. The District of Columbia Court of Appeals has consistently reiterated the continuing authority of *Oljato* subsequent to the 1977 legislative overhaul. *See, e.g., Envtl. Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 813 (D.C. Cir. 1983); *United States Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 978-79 (D.C. Cir. 1979).

> under the APA even if the substance of the denial is not so appealable. In such a case, the District Court would have the power to demand that the Administrator issue a response, or a more complete response even if it would not have the power to invalidate the standard of performance or order a revision.

Id. at 667 n.20 (emphasis added). The limited role which *Oljato* footnote 20 allows to a district court is inapplicable here, however, since the *Oljato* procedure has not been invoked.

I do not view the provision of Section 109(d)(1) that the Administrator "shall" complete a thorough review of criteria at specified five-year intervals "and promulgate such new standards as may be appropriate" as providing a stated deadline, within the meaning of *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), as to the promulgation of standards. *Sierra Club* states: "In order to impose a clear-cut nondiscretionary duty [enforceable under section 304], we believe that a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Id.* at 791 (quoting *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)). It doesn't seem to me that Section 109(d) meets this standard, since there is pretty clearly no requirement that standards be finally promulgated at the specified five-year intervals, or by any other date-certain deadline.[2]

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[2] Footnote 1 of the majority opinion concludes that such a five-year deadline was imposed by section 109(d). The postulated deadline could be met, however, by a determination that no revision is appropriate at the time of the deadline, but a revision will be made if later developments warrant. This is essentially what the Administrator did here. In any event, this scenario points up the anomaly of forcing the Administrator's essentially discretionary section 109(d) determination to "promulgate such new standards as may be appropriate" into the straightjacket of section 304(a)(2) review of "any act or duty under this chapter which is not discretionary with the Administrator." In my view, the *Oljato* procedure

I would accordingly view this case as falling within the rule stated in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984): "we hold that where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Circuit Court of Appeals." A footnote, appended to the quoted statement, specified that this holding had "been considered separately and approved by the whole court, and thus constitutes the law of this circuit." *Id.* at 75 n.24.

I therefore respectfully dissent.

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provides a preferable approach to Administrator inaction in areas committed to his discretion. I note in this regard the majority statement that a decision with respect to revision was required "[i]n view of the revised criteria and 'Critical Assessment,'" and the necessary implication that courts other than the District of Columbia Court of Appeals will review, to some undetermined extent, the substance of discretionary decisions by the Administrator.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 9507 (DNE)

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND,

Plaintiffs,

-against-

LEE M. THOMAS, Administrator of the United States Environmental Protection Agency and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants,

and

ALABAMA POWER COMPANY, PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO, INCORPORATED, and MAGMA COPPER COMPANY,

Intervenors.

OPINION AND ORDER

[Filed April 19, 1988]

APPEARANCES:

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EDELSTEIN, District Judge:

Plaintiffs brought suit pursuant to 42 U.S.C. Section 7604 seeking to compel the Administrator of the Environmental Protection Agency ("EPA") to review and revise the existing air pollution standards for sulfur oxides. Plaintiffs subsequently moved for summary judgment. Defendants, in turn, moved for dismissal of the complaint or in the alternative, for an order granting summary

judgment. Finding that it lacks subject matter jurisdiction over the instant action, the court grants defendants' motion to dismiss.

BACKGROUND

Statutory Scheme

The Clean Air Act, 42 U.S.C. § 7401 et seq., establishes a system by which the federal government and the individual states cooperate in an effort to control air pollution. Central to this goal is 42 U.S.C. § 7408(a)(1)'s directive that the Administrator of the EPA ("Administrator") identify those pollutants "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare [and] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." *Id.*

Once a pollutant has been so identified, the Administrator is obliged to issue "air quality criteria" which describe the latest scientific knowledge relevant to the determination of the effects of the pollutant in the ambient air on the public health or welfare. 42 U.S.C. § 7408 (a)(2) Under the Clean Air Act, the term criteria is not used in its usual sense of constituting standards or guidelines. Rather, the criteria document produced pursuant to section 7408 (a)(2) supplies the scientific basis for the production of "national ambient air quality standards" setting limits on the permissible concentration of the relevant pollutants in the air. 42 U.S.C. § 7409(a). Under Section 7409 (b)(1) the Administrator must promulgate primary standards limiting pollutant concentrations to levels "which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The Administrator must also promulgate secondary standards specifying a "level of air quality the attainment and maintenance of

which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare." 42 U.S.C. § 7409(b)(2).

After the ambient standards are established, responsibility under the Clean Air Act shifts to the individual states. Each state must submit to the EPA a state implementation plan by which the standards might be realized. 42 U.S.C. §7410(a); *see also Lead Industries Association v. EPA*, 647 F.2d 1130, 1136-37 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (overview of promulgation process).

Standards, once established, are not immutable. Under Section 7408(c), the Administrator is under an obligation to "from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section." *Id.* Further, in 1977, Congress imposed time limits on the process of review and possible revision of standards by adding Section 7409(d)(1) to the Clean Air Act. Section 7409(d)(1) requires that by December 31, 1980, and every five years thereafter, the Administrator shall thoroughly review and, as appropriate, revise air quality criteria and standards.

Sulfur Oxides

In 1971, the Administrator promulgated primary and secondary pollutant standards for sulfur oxides. *See* 36 Fed. Reg. 8186 (1971). The secondary standards were subsequently directly challenged in the Circuit Court for the District of Columbia in 1972, and were remanded to the administrator for further explanation of their basis. *See Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). As a result of reconsideration following remand, the secondary standards were modified in 1973. 38 Fed. Reg. 25678 (1973).

Although the primary standards have not been altered since 1971, and the secondary standards have not been

altered since 1973, review of the criteria and standards for sulfur oxide has occurred more recently. In 1984, the EPA issued a revised criteria document for sulfur oxides and completed a review of the sulfur oxide standards. That review did not result in any revision of the sulfur oxide standards. In 1986, the Administrator once again reconsidered the existing standards and opted against making any revisions at that time. *See* Plaintiff's Exhibit J at 11-12. Since that decision, the EPA has continued to accumulate data on sulfur oxide pollution.

Faced with the Administrator's decision not to revise the sulfur oxide standards, the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, and the National Parks and Conservation Association informed the EPA of their intention to bring suit if revisions did not issue. The Administrator did not revise the standards and the instant action was filed. Pursuant to Fed. R. Civ. P. 24(b)(2), the court permitted intervenors to join in the action. The plaintiffs subsequently moved for summary judgment. The defendants, in turn, moved to dismiss the complaint or, in the alternative, for an order granting summary judgment.

Jurisdiction

As a threshold inquiry, this court must determine whether it has jurisdiction over the instant action. This case is a citizen suit filed pursuant to 42 U.S.C. § 7604[1] (Section 304 of the Clean Air Act). Section 7604 provides that any person may commence a civil action in his own behalf to compel the Administrator of the EPA to

[1] 42 U.S.C. Section 7604 provides in part "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." *Id.*

For a discussion of the alternative bases for jurisdiction propounded by the plaintiff, see *infra*, pages 26-28.

perform non-discretionary duties. *Id.* at (a)(2). Such civil actions are appropriately brought in the federal district courts. Challenges to the discretionary acts of the Administrator, on the other hand, are beyond the scope of Section 7604 and must be brought pursuant to 42 U.S.C. § 7607 (Section 307 of the Clean Air Act).[2] Juris-

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[2] Section 7607(b) of Title 42 provides:

Judicial Review. (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 U.S.C. § 7412], any standard of performance or requirement under section 111 [42 U.S.C. § 7411], any standard under section 202 [42 U.S.C. § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 U.S.C. § 7521(b)(1)]), any determination under section 202(b)(5) [42 U.S.C. § 7545], any standard under section 231 [42 U.S.C. § 7571] any rule issued under section 113, 119, or under section 120 [42 U.S.C. §§ 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 U.S.C. § 7410 or 7411(d)], any order under section 111(j), [42 U.S.C. § 7411(j)], under section 112(c) (42 U.S.C. § 7412(c)], under section 113(d) [42 U.S.C. § 7413(d)], under section 119 [42 U.S.C. § 7419], or under section 120 [42 U.S.C. § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any final action of the Administrator under title I [42 U.S.C. §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Courts of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days

diction over suits brought pursuant to Section 7607 is expressly limited to the United States Circuit Court for the District of Columbia. Thus, in determining whether this court has jurisdiction to hear this dispute, it is necessary to examine the nature of the Administrator's duties.

Plaintiffs argue that the Administrator has failed to perform certain nondiscretionary duties imposed upon by by 42 U.S.C. § 7409(d) (Section 109(d) of the Clean Air Act). Section 7409(d) provides that:

> [n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 [42 U.S.C. § 7408] and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 [42 U.S.C. § 7408] and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

Plaintiffs in their motion for summary judgment, contend that the Administrator failed to perform 1) the nondiscretionary duty to revise the primary standards for sulfur oxides prior to December 31, 1985; 2) the nondiscretionary duty to revise the secondary standards for sulfur oxides prior to December 31, 1985; and 3) the nondiscretionary duty to revise the ambient standards for sulfur oxides simultaneously with the issuance of air quality

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from the date of notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

criteria.[3] Accordingly, plaintiffs request that the Administrator be ordered to propose revisions to the standards within thirty days and promulgate a final rule ninety days thereafter. Defendants, in response, claim that the duties described by the plaintiffs are in fact discretionary and thus beyond the scope of a section 7604 citizen suit. Accordingly, defendants move to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, move for an order granting summary judgment.

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[3] The complaint filed in the instant case also charges that the EPA failed to perform its non-discretionary duty to review the sulfur oxide standards and accordingly requests that such a review be ordered. This claim was not pressed in the motion for summary judgment and plaintiffs now concede that a review did in fact occur. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment, at 50. If there had been any failure to make timely reviews of the standards prior to the most recent review, such an omission does not constitute a live controversy and is not justiciable. *See Jackson v. Village of Ossining*, No. 82-2012, slip op. (S.D.N.Y. March 30, 1983) (action to compel Secretary of Housing and Urban Development to take mandatory action rendered moot by compliance with duty after case was filed).

The plaintiffs also claim that the Administrator failed in his mandatory duty to publish a formal notice of the completion of his review of the sulfur oxides standards and a formal determination as to the adequacy of the current standards to protect public health and welfare. If the Administrator determines that revision is appropriate, he must then publish proposed revisions to the standards. 42 U.S.C. §§ 7607(d)(a)(A), (d)(3). The Clean Air Act however, makes no provision for the publication of the Administrator's decision that revision of the standards is not called for. Absent clear instruction from Congress, courts should be reluctant to deem duties mandatory, and thus reviewable under 42 U.S.C. § 7401. *See Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978). Here, not only is there no indication in the statute that the duty is mandatory, there is no indication that any such duty exists. As the Administrator has no mandatory duty to publish his decision to not alter pollutant standards, there can be no review pursuant to 42 U.S.C. § 7401 of the failure to publish. Thus, this court lacks subject matter jurisdiction over this claim.

Discretionary Duty

In establishing the citizen suit provision of the Clean Air Act, Congress was clearly concerned with the possibility that abuse of that provision could lead to disruption of the administrative process. Accordingly, Congress limited section 7604's applicability to actions compelling the Administrator to perform "specific non-discretionary clear-cut requirements." *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981). Thus, in accordance with Congress' intent to limit disruption of the Administrative process, this court begins its analysis with the proposition that a court, absent clear statutory language to the contrary, should be reluctant to deem duties non-discretionary. *See Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978).

Plaintiffs contend that the duties in question are clearly of a nondiscretionary nature. In support of their position, plaintiffs argue that the text of Section 7409(d) when read in conjunction with certain factual findings made by the EPA demonstrates that the duties are mandatory. Further, plaintiffs contend that 42 U.S.C. § 7409 (a)(2), when read in conjunction with Section 7409(d), required the Administrator to issue revised standards for sulfur oxides when he issued revised sulfur oxide criteria. The defendants, in turn, contend that the statutes in question impose only the requirement that the Administrator exercise his discretion. Each of these areas of contention shall be addressed in turn.

1. Section 7409(d)

Plaintiffs note that section 7409(d) states that the Administrator "shall" complete a review of air quality standards not later than December 31, 1980, and at five year intervals thereafter and "shall" make such revisions as may be appropriate. 42 U.S.C. § 7409(d). Plaintiffs also note that Section 7409(d) provides that the "Ad-

ministrator may review and revise criteria or promulgate new standards earlier or more frequently than *required* under this paragraph." *Id.* (emphasis added).

The term "required" demonstrates that the section 7409(d) does impose some mandatory duty on the Administrator. Specifically, the term "shall" clearly imposes a duty on the Administrator to periodically review air quality standards. Plaintiffs, however, do not contend that the Administrator has failed to perform his obligation to review the air quality standards relevant to sulfur oxides. *See supra* note 3. Rather, plaintiffs contend that the Administrator's review demonstrates that the existing standards are inadequate and accordingly those standards must be revised.

The text of Section 7409(d), per se, cannot be read to supply the basis for an order requiring the Administrator to now revise the standards for sulfur oxides. Although section 7409(d) does mandate the review of the relevant standards, revision of those standards is apparently left to the discretion of the Administrator. The language of the statute provides that the Administrator shall make such revisions "as may be appropriate." The term "may" is properly understood to be permissive. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). The determination of what is "appropriate" clearly calls for the exercise of discretion and expert judgment. *Cf. American Iron & Steel Institute v. Costle*, 12 Env't Rep. Cases 1008, 1009 (W.D. Pa. 1978) (interpreting term "as appropriate" appearing in 42 U.S.C. § 7408(c), Section 108 (c) of the Clean Air Act). Such a decision "requires the fusion of technical knowledge and skills which is the hallmark of duties which are discretionary." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978); *see also Connecticut Fund for the Environment, Inc. v. EPA*, 696 F.2d 169, 177 (2d Cir. 1982) (court deferring to Agency's expertise on technical issue).

Under the terms of the statute, it is possible that the Administrator could find, following his review of the criteria, that revision is not called for. *See City of Spokane v. Thomas*, No. C-85-095, slip op. (E.D. Wash. June 10, 1985) (Plaintiffs' Exhibit R). In the Administrator's view, this is precisely the scenario presented by the instant case. Thus, if the court was to accept the Administrator's representation that he decided that revisions are not now called for, it would appear that the Administrator has satisfied those mandatory duties which exist under Section 7904(d).[4] Specifically, the Administrator has completed his review of the sulfur oxide criteria and

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[4] In support of their position, defendants cite to the case of *Oljato of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975). In *Oljato*, the petitioners challenged the EPA's refusal to revise previously promulgated standards for emissions of sulfur oxides from newly constructed coal fueled electricity generation stations. In that case, rejecting a claim that failure to revise constituted a violation of a nondiscretionary duty, the Circuit Court ruled that the action to compel revision of standards was beyond the jurisdiction of the district court.

In *Oljato*, the standards in question were promulgated pursuant to 42 U.S.C. § 1857 c-6 (1970), (Section 111 of the Clean Air Act). That section provided that "[t]he Administrator may, from time to time, revise such standards." This language, although not identical, is similar to Section 7409(d)'s instruction that "[t]he Administrator shall make revisions . . . as may be appropriate." This similarity supports defendants' claims that Section 7409(d), like Section 111 of the Clean Air Act as it was interpreted in *Oljato*, creates merely a discretionary obligation on the part of the Administrator.

Oljato is also significant in that it demonstrates that by adopting the EPA's interpretation of Section 7409(d), this court does not insulate the Administrator's acts from judicial review. *Oljato* establishes a procedure by which plaintiffs could petition the EPA to revise the relevant standard. If that petition were to be denied, plaintiffs could then seek judicial relief in the Circuit Court for the District of Columbia pursuant to 42 U.S.C. § 7607. *See Oljato* at 666.

standards.[5] Although rejected by this court, the proposition that review and revision of pollutant standards are inevitably linked is not totally without basis.[6] On the other hand, an Administrative Agency's construction of a statutory scheme it was entrusted to enforce is to be given deference absent clear contrary congressional intent. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (interpreting Clean Air Act). In the instant case, the Administrator's reading of the statute follows from the section's language and is consonant with the legislative intent embodied in section 7409.[7] Thus, this court rejects the proposition that under the terms of Section 7409(d), the Administrator is now under a nondiscretionary duty to revise the standards for sulfur oxides.

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[5] Section 7409(d) includes both the words "shall" and "may" in a single sentence. When such words are used in such close proximity, there is fair inference that Congress realized the differences in meaning and intended different treatment for the predicates following those terms. 2A N. Singer, Sutherland Statutes and Statutory Construction § 57.11 (4th ed. 1984). Thus, it appears that the process of review, which "shall" take place, is mandatory. On the other hand, the process of revision, which is to take place "as may be appropriate," is discretionary. 42 U.S.C. § 7409(d).

[6] For example, in the case of *City of Spokane v. Thomas*, No. C-85-095, slip op. (E.D. Wash. June 10, 1985), the Court speaks of a duty to "review *and* revise" imposed by section 7409(d). *Id.* at 1 (emphasis added). In *Thomas*, however, the court at no time stated that a review must result in a revision of the relevant standard. Indeed, the *Thomas* Court expressly recognized that the mandatory review might appropriately lead the Administrator to decide not to alter the existing standard. *Id.* at 10. Thus, for this reason, and for the reasons stated above, this court rejects the proposition that the Administrator was under a nondiscretionary duty to revise the standards for sulfur oxides.

[7] Section 7409(d)'s legislative history supports defendants' claims of broad discretion in determining when and how to revise pollutant standards. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 182-83 (1977).

Plaintiffs, nevertheless, assert that in light of certain factual findings allegedly made by the Administrator, Section 7409(d) now compels the Administrator to revise the sulfur oxide standards. Specifically, plaintiffs assert that following the Administrator's review of the sulfur oxide standards, the Administrator, despite his current protests to the contrary, determined that the existing standards are inadequate. Therefore, it is contended, the Administrator is now under a mandatory duty to revise the standards. In support of this proposition, plaintiffs argue that the instant case is analogous to the case of *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976).

In that case, the Second Circuit ruled that upon determining that a given pollutant satisfies the requisites of 42 U.S.C. § 7408, the Administrator had a nondiscretionary duty to list that pollutant.[8] Section 7408 pro-

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[8] Section 7408(a) provides:

(1) For the purpose of establishing national primary and secondary ambient quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient

vides that a pollutant must be added to the official list of air pollutants when the Administrator determines that the pollutant has an adverse effect on public health or welfare, *see* 42 U.S.C. § 7408(a)(1)(A), and is introduced into the ambient air from numerous or diverse mobile or stationary sources. *See* 42 U.S.C. § 7408(a)(1)(A). After including a pollutant on the list, the Administrator must issue air quality criteria for that pollutant within twelve months.

In *Train*, the EPA acknowledged that these criteria had been satisfied. Nevertheless, the Administrator declined to list lead as a pollutant. In doing so, the Administrator argued that there was a third criterion yet to be satisfied. Specifically, the Administrator relied on Section 7408(a)(1)(C). That subsection provides that a pollutant shall be listed if air quality criteria had not been issued for that pollutant before December 31, 1970 but the Administrator does plan to issue air criteria pursuant to Section 7408. Thus, the Administrator claimed that even when the criteria set forth in Section 7408(a)(1)(A) and (B) were met, he would be free, if he so chose, to decline to list the pollutant.[9]

Examining the section's legislative history, the Second Circuit rejected the proposition that Section 7408(a)(1)

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air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

[9] Despite the position taken by the Administrator in *Train*, the Administrator had previously operated on the policy that upon satisfying Section 7408(a)(1)(A) and (b)(1)(B), a pollutant must be listed. *Train*, 545 F.2d at 325.

(C) adds a third condition to the list of a pollutant. Thus, as the EPA conceded that the pollutant satisfied the requirements of the first and second criteria, the Administrator was ordered to list the pollutant.

In the instant case, a quite different section of the Clean Air Act is being subjected to the judicial scrutiny. The legislative history for Section 7408 clearly contradicted the Administrator's interpretation of that section. In the instant case, the Administrator's understanding of Section 7409 follows from the language of that section. Further, the legislative history supports the Administrator's interpretation of Section 7409. *See supra* note 7. In *Train*, the Administrator declined to perform a clear mandatory duty imposed by Congress. In the instant case, the text and intent of the relevant statute calls for the exercise of discretion on the part of the Administrator. Thus, the interpretation of Section 7408 found in *Train* is not applicable to Section 7409.

The Second Circuit's decision in *Train* merely required that lead be included in the list of pollutants compiled under Section 7408. Section 7408, which calls for the listing of a pollutant upon the satisfaction of two specific criteria is quite different than a revision of pollutant standards pursuant to Section 7409. The establishment and revision of standards requires the marshalling of extensive scientific data, the weighing of conflicting reports, and an ultimate exercise of judgment and discretion. Another significant difference between *Train* and the instant case is that in *Train*, the EPA conceded that all valid statutory prerequisites to listing a pollutant had been met. In the instant case, although plaintiffs assert that the Administrator has found that the sulfur oxide concentrations allowed under the existing standards cause adverse effects on public health or welfare, the Administrator contests that any such finding was made. In support of their contention, plaintiffs cite a number of EPA studies and documents. The plaintiffs, however, are

not able to cite to any express finding by the Administrator that the existing standards are inadequate to protect the public health or welfare. Rather, it is contended that in the aggregate, the studies and documents cited constitute such a finding.

The documents cited cannot fairly be read to be a finding by the Administrator that revision of standards is now appropriate. The plaintiffs, in effect, are selectively reviewing the technical data presented to the Administrator, and seek to replace his judgment with their own or with the judgment of this court. Further, even if the EPA had found the existing standards inadequate, in order to issue revised standards, the Administrator must be able specify a standard which would be "requisite to protect" the public health or welfare from the adverse effects of the relevant pollutant. 42 U.S.C. § 7409 (b). There exists considerable scientific debate regarding the causes and specific nature of sulfur oxide pollution. It is clear that scientific uncertainty is not a bar to agency action. *See Lead Industries Association v. EPA*, 647 F.2d 1130, 1154-55 & n.50 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). Nevertheless, scientific uncertainty is clearly relevant to the question of whether the Administrator, in his discretion, can establish a new standard requisite to protect the public health or welfare.

The plaintiffs are no doubt sincere in contesting the adequacy of the existing sulfur oxide standards. However, as the setting of those standards falls within the discretion of the Administrator, any challenge must be made in the Circuit Court for the District of Columbia. *See* 42 U.S.C. § 7607. A Section 4604 citizen suit may not be used to substitute the Administrator's judgment with that of a plaintiff. The process by which the Administrator must decide whether or how to revise the standards is complex. Under 4709(b), the Administrator must make a two-fold determination. First, the Administrator must determine whether ambient concentrations

of the pollutant are adversely affecting the public health or welfare. Second, the Administrator must be able to specify a new or revised standard level that is "requisite to protect" the public health or welfare from such adverse effects. Such determinations clearly require marshalling of scientific data and the exercise of expert judgment. These are tasks appropriately left to an administrative agency.[10]

2. Section 7409(a)(2)

In further support of the proposition that the Administrator is now obliged to revise the sulfur oxide standards, plaintiffs cite 42 U.S.C. § 7409(a)(2).[11] That sub-

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[10] The text of 42 U.S.C. § 7409(b), the section prescribing the goals for pollutant standards, underscores the discretion afforded the Administrator in setting and revising pollutant standards. That section provides:

> National primary ambient air quality standards, prescribed, under subsection (a) shall be ambient air quality standards the attainment and maintenance of which *in the judgment of the Administrator*, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.
>
> (2) Any national secondary ambient air quality standard prescribed, under subsection (a) shall specify a level of air quality the attainment and maintenance of which *in the judgment of the Administrator* based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Id. (emphasis added).

[11] Intervenors argue that this court should not now consider plaintiffs' claim that the Administrator failed to perform his duties under 42 U.S.C. § 7409(a)(2). Intervenors' claim of preclusion is based on plaintiffs' failure to seek relief pursuant to 42 U.S.C. § 7607(b)(1) within sixty days of the March 1984 Federal Register announcement of the publication of the revised criteria document. As plaintiffs have asserted that the Administrator

section, which was added to the Clean Air Act as part of the 1970 amendments to that statute, provides in pertinent part:

> With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], the Administrator *shall publish, simultaneously* with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant.

Id. (emphasis added).

Plaintiffs argue that under Section 7409(a), the EPA was obliged to simultaneously issue new sulfur oxide standards when it issued revised sulfur oxide criteria. It is not contested that revised sulfur oxide criteria were issued. Nevertheless, the Administrator argues that he was not obligated to simultaneously publish proposed air quality standards for those pollutants. In support of this position, the Adminstrator argues that the simultaneous publication requirement is limited to the initial issuance of criteria for pollutants and is not applicable to subsequent revisions of such criteria. Further, the Administrator contends that the simultaneous publication requirement applies only to pollutants for which criteria were first issued after the 1970 enactment date of Section 7409 (a)(2).

To best understand the scope of Section 7409(a)(2)'s simultaneous publication requirement, it is helpful to examine that section in context with 42 U.S.C. §§ 7409(a)(1)(A) and (B). Those sections provide:

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failed to perform a nondiscretionary duty, absent further inquiry, it would be unclear whether their claim could be heard pursuant to 42 U.S.C. § 7604. Accordingly, inquiry as to the merits of plaintiffs' claim is appropriate. As this court concludes that the Administrator was not under any obligation to publish standards simultaneously with the publication of the criteria document, intervenors' procedural objection is ultimately of no moment.

> (1) (A) [The Administrator] within 30 days after the date of enactment of the Clean Air Act Amendments of 1970 [enacted Dec. 31, 1970], shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and
>
> (B) after a reasonable time for interested persons to submit written comment thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

Id.

Sections 7409(a)(1)(A) and (B) set forth the procedure by which standards would be established for pollutants for which air quality criteria had been established prior to the enactment of the 1970 amendments to the Clean Air Act.[12] Those pollutants include sulfur oxides, the subject of the instant litigation. Section 7409(a)(2), and its simultaneous publication requirement, on the other hand, relates by its terms to those pollutants for which criteria were issued after the date of the enactment of Section 7409(a). Thus, at least prior to the issuance of revised sulfur oxide criteria, Section 7409(a)(2) had no application to the control of sulfur oxide pollution. *See* S. Rep. 1196, 91st Cong. 2d Sess. 10-11 (1970) (indicating Section 7409(a)(2) is inapplicable to sulfur oxides).

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[12] Prior to the passage of the 1970 Amendments to the Clean Air Act, including the addition of Section 7409, air quality criteria had already been established for a number of pollutants. Sulfur oxides were among those pollutants.

It is less certain, however, whether any subsequent revision of sulfur oxide criteria would implicate Section 7409(a)(2). That section does not expressly provide that its scope is limited to the initial issuance of criteria. Similarly, it is not explicitly stated that Section 7409(a)(2)'s purview does not include subsequent revisions of standards issued pursuant to Sections 7409(a)(A) and (B). Nevertheless, the organization and history of Section 7409 indicate this is in fact the case.

In 1977, Section 7409(d) was added to the Clean Air Act. While the text of Section 7409(a) has as its heading "[p]romulgation" of national primary and secondary ambient air quality standards, the heading of Section 7409(d) reads "[r]eview and revision of criteria and standards . . . ." Although statutory headings are not properly used to refute the plain meaning of a statute, they do supply guidance in interpreting ambiguities in that statute. *See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947). The plain language of Section 7409 does not unequivocally support either plaintiffs' or defendants' reading of the simultaneous publication requirement. The relevant headings, however, do support the defendants' contention that there is a bifurcation of the processes of promulgating and revising standards. Further, such bifurcation supports defendants' argument that the simultaneous publication requirement applies only to the initial promulgation of criteria and standards.

Section 7409(d) clearly governs the procedure by which criteria and standards are to be revised. Significantly, Section 7409(d) does not contain any provision calling for simultaneous publication nor does it cross-reference to Section 7409(a)(2). Further, by providing that the "Administrator may review and revise criteria *or* promulgate new standards" more frequently than required under the statute, Section 7409(d) does not inexorably link the revision of criteria and the issuance of standards.

Id. (emphasis added). Under 7409(d), the Administrator is granted broad discretion to make "appropriate" revisions in both pollutant criteria and standards. It would appear that the Administrator's decision to revise the sulfur oxide criteria without also issuing new standards is included within such discretion.

The Administrator's reading of Sections 7409(a) and (d) follows from both the language and organization of those sections. An administrative agency's construction of a statutory scheme it was entrusted to enforce is to be given deference absent clear contrary congressional intent. *Chevron U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984) (interpreting Clean Air Act). There has been no showing that Congress' intent differs from the Administrator's interpretations of his obligations under Section 7409. Accordingly, this court rejects plaintiffs' assertion that under Section 7409(a)(2), the Administrator was obliged to simultaneously publish revised standards upon issuing revised criteria. Thus, it is apparent that the revision and publication of sulfur oxide pollutant standards falls within the discretion of the Administrator. As plaintiff's complaint addresses non-mandatory duties, the complaint's invocation of jurisdiction pursuant to 42 U.S.C. § 7604 is unavailing.

Alternative Bases for Subject Matter Jurisdiction

In addition to invoking federal jurisdiction pursuant to the citizen suit provisions of the Clean Air Act, the plaintiff relies on federal question jurisdiction, 28 U.S.C. § 1331, the Mandamus Act, 28 U.S.C. § 1361, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, as additional bases for subject matter jurisdiction in the instant case. Appeal to these statutes is unavailing.

Federal question jurisdiction is not appropriately invoked when the federal statute in question establishes the

means by which it is to be enforced. *See Telcommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). The Clean Air Act provides that a private citizen may bring suit in the federal district courts to compel the Administrator to perform nondiscretionary duties. *See* 42 U.S.C. § 7604(a)(2). Discretionary duties, such as those addressed in plaintiffs' complaint and motion for summary judgment, by the terms of 42 U.S.C. § 7607(b), may only be reviewed in the Circuit Court for the District of Columbia. When a statute vests jurisdiction in one particular court, all other courts lose jurisdiction over cases brought pursuant to that statute. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984).[13] The acts and omissions which are the subject of this action fall within the scope of the discretion of the Administrator. Thus, jurisdiction could only exist in the Circuit Court for the District of Columbia and plaintiff's appeal to federal question jurisdiction in this court must fail. *See Dow Chemical Co. v. Costle*, 480 F. Supp. 315, 320 (E. D. Mich. 1978), *aff'd* 659 F.2d 724 (6th Cir. 1981).

Both the Mandamus Act and the Declaratory Judgment Act are remedial in nature and do not supply any independent basis for jurisdiction. *See St. Vincent's Hospital v. Division of Human Rights*, 553 F. Supp. 375, 377 (S.D.N.Y. 1982) (Declaratory Judgment Act); *Smith v. Lehman*, 533 F. Supp. 1015, 1018 (E.D.N.Y.), *aff'd*, 689 F.2d 342 (2d Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983) (Mandamus Act). Further, the Mandamus Act is unavailable absent a plainly defined and mandatory duty. *See Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984). As indicated above, the Administrator has ig-

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[13] The text of 42 U.S.C. § 7607(e) further supports the conclusion that federal question jurisdiction is unavailable in the instant case. That section provides "[n]othing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." *Id.*

nored no such duty. Thus, the alternative bases for jurisdiction propounded by plaintiffs are unavailing. As this court lacks subject matter jurisdiction over the instant action, this court does not rule on the motions for summary judgment but rather dismisses the complaint.

CONCLUSION

The defendants' motion to dismiss the complaint for lack of subject matter jurisdiction is hereby granted.

SO ORDERED

Dated: New York, New York
April 19, 1988

/s/ David N. Edelstein
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 CIVIL 9507 DNE

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs

-against-

LEE M. THOMAS, ADMINISTRATOR OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et ano*

-and-

ALABAMA POWER COMPANY, *et al.*,
Intervenors

JUDGMENT

Plaintiffs having moved for summary judgment and the defendants having moved for dismissal of the complaint or in the alternative for summary judgment and the said motions having come before the Honorable David N. Edelstein, U.S.D.J., and the Court thereafter on April 19, 1988, having handed down its opinion and order (#62411), granting defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed for lack of subject matter jurisdiction.

DATED: NEW YORK, N.Y.
April 21, 1988

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of March one thousand nine hundred and eighty-nine.

Present:

HON. ELLSWORTH A. VANGRAAFEILAND

HON RALPH K. WINTER

HON. J. DANIEL MAHONEY

Circuit Judges,

88-6142

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND,

Plaintiffs,

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE,

COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA,

Plaintiffs-Appellants,

-v.-

LEE M. THOMAS, Administrator of the U.S. Environmental Protection Agency, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees,

ALABAMA POWER COMPANY, et al., PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO INCORPORATED, MAGMA COPPER COMPANY,

Intervenors-Appellees.

Appeal from the United States District Court
for the Southern District of New York

MANDATE
[Filed March 22, 1989]

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of the said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighth day of June, one thousand nine hundred and eighty-nine.

Docket Number 88-6142

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA, and STATE OF RHODE ISLAND, *Plaintiffs*,

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NATIONAL PARKS AND CONSERVATION ASSOCIATION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW HAMPSHIRE, COMMONWEALTH OF MASSACHUSETTS, STATE OF VERMONT, STATE OF MINNESOTA,
Plaintiffs-Appellants,

-v.-

LEE M. THOMAS, Administrator of the U.S. Environmental Protection Agency, and the U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants-Appellees,

ALABAMA POWER COMPANY, et al., PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, CONSOLIDATION COAL COMPANY, AMERICAN MINING CONGRESS, ASARCO INCORPORATED, MAGMA COPPER COMPANY,
Intervenors-Appellees.

[Filed June 8, 1989]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees ALABAMA POWER CO. ET AL., PEABODY HOLDING CO. INC., PEABODY COAL COMPANY, ASARCO INCORPORATED, MAGMA COPPER CO.

UPON CONSIDERATION by the panel that heard the appeal, it is –

Ordered that said petition for rehearing is DENIED, Judge Mahoney dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

STATUTORY PROVISIONS

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate

in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later

than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standards for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period

of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required

to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an order, or to order the Administrator to perform such act or duty, as the case may be.

§ 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable

may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

* * * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

* * * *

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). When-

ever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rule-

making. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B) (i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary informa-

tion; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completition of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7) (A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4) (B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule

and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capracious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of para-

graph (7) (B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 9507 (DNE)

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs,

v.

LEE M. THOMAS, *et al.*,
Defendants,

and

ALABAMA POWER COMPANY, *et al.*,
Intervenor-Defendants.

DEFENDANTS' ANSWERS TO FIRST SET OF INTERROGATORIES

Pursuant to the Federal Rules of Civil Procedure, the defendants, Lee M. Thomas and the United States Environmental Protection Agency, answer the following interrogatories of plaintiffs Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, and National Parks and Conservation Association as follows:

* * * *

18. Did the Administrator complete a review of the National Ambient Air Quality Standards for sulfur oxides by December 31, 1985, or any date subsequent thereto?

    Yes; the Administrator and Agency staff have been conducting a continuous and thorough going review of the scientific and technical aspects of the SO_2 standards, since before 1980. The results of that review, which incorporated the findings and recommendations

of the Clean Air Scientific Advisory Committee, were communicated to the Administrator in written summary, briefing materials, and oral presentations. In the case of William Ruckelshaus, this review process was completed by June 1984. Subsequently, the current Administrator Lee Thomas, initiated another review of the SO_2 standards and has received a number of briefings on those standards. This review was completed in January 1986.

18a. If the answer to 18 is "YES," state the conclusions of that review. Please identify all documents in which those conclusions are set out.

In brief, this continuous process of review of the SO2 standards has resulted in the following provisional conclusions: 1) The current SO2 standards provide substantial protection against the direct effects on asthmatics; 2) Adding a new 1-hour standard would provide some incremental improvement in protection against short-term effects; 3) It is not appropriate, based on available information, to establish ambient standards for sulfur oxides to control acid deposition. These conclusions are subject to revision as the Agency continues to review the standards.

1. "Review of the National Ambient Air Quality Standards for Sulfur Oxides: Assessment of Scientific and Technical Information: OAPQS Staff Paper," EPA-450/5-82-007, November 1982.

2. Draft Federal Register Preambles—National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide), latest draft dated 9/11/84.

3. Memorandum—Subject: "Proposed Revisions to the Air Quality Standards for Sulfur Oxides—Action Memorandum," from Joseph A. Cannon to Milton Russell, dated 9/11/84.

4. Memorandum—Subject: "Region 9 Comments on Proposed Revisions to the NAAQS for Sulfur Oxides —SAR 1002," from David Howekemp to C. Ronald Smith, dated 10/22/84.

5. Memorandum—Subject: "Proposed Rule: NAAQS for Sulfur Oxides SAR 1002," from Randall F. Smith to C. Ronald Smith, dated 10/22/84.

6. Memorandum—Subject: "Regulation Review—NAAQS for Sulfur Oxides (SAR-1002)," from Valdas V. Adamkus to Odelia Funk, dated 10/10/84.

7. Memorandum—Subject: Region II Comments on Proposed NAAQS for Sulfur Oxides, from Herbert Barrack to C. Ronald Smith, dated 11/1/84.

8. Steering Committee Hand-out—"Issues Concerning the SO2 NAAQS Proposal Package," not dated.

9. Memorandum—Subject: Steering Committee Closure on Proposed NAAQS for Sulfur Oxides, from C. Ronald Smith to Gerald Emison, Joan LaRock, dated 2/19/85.

10. Memorandum (with Attachments)—Subject: "Sulfur Oxides Options Selection Meeting, April 16," from Joseph A. Cannon to Deputy Administrator, Assistant Administrators, General Counsel, Associate Administrator for Regional Operations, dated 4/3/84.

11. Memorandum and attachments—Subject: "Options Selection Meeting, April 16, 1984: Closure Memo for OAR's National Ambient Air Quality Standards for Sulfur Oxides," from Milton Russell to Deputy Administrators, Assistant Administrators, Associate Administrators, Regional Administrators, General Counsel, Inspector General, dated 5/8/84.

12. "Briefing Book"—Outlining Status of the Review of the National Ambient Air Quality Standards for Sulfur Oxides, not dated. Note briefing book originally

prepared Spring of 1984, updated through September of 1985 for Mr. Thomas.

13. Briefing charts on the review of sulfur oxides NAAQS for: 1) the Administrator on May 29, 1984, April 10, 1985, July 31, 1985, August 1, 1985, August 22, 1985, September 13, 1985, September 25, 1985, October 2, 1985, January 15, 1986; 2) the Deputy Administrator on January 13, 1984, February 29, 1984; 3) the Assistant Administrator for OAR on February 14, 1985, September 10, 1984; and 4) the Director, Office of Air Quality Planning and Standards, May 22, 1984.

14. Briefing Document for the Administrator (with Appendices) by The Acid Deposition Task Force, dated 8/1/83.

15. Memorandum—Subject: "Draft SO2 NAAQS Preamble," from John Bachmann to Bruce Jordan, dated 8/15/84.

16. Memorandum—Subject: "Draft SO2 NAAQS Preamble and Action Memorandum," from Gerald A. Emison to Joseph A. Cannon, dated 8/30/84.

17. Memorandum—Subject: "Review of Draft SO2 NAAQS Preamble," from John Bachmann to B. Bauman, A. Cristofaro, G. Gleason, L. Grant, T. Helms, H. McKinnon, V. Nazar, D. Patton, P. Stolpman, T. Yosie, dated 7/23/84.

18. Memorandum—Subject: "Review of National Ambient Air Quality Standards for Sulfur Oxides," from Joseph Padgett to Joseph Cannon, dated 11/10/83.

19. Memorandum—Subject: "Review of National Ambient Air Quality Standards for Sulfur Oxides," from Joseph A. Cannon to the Administrator, thru Deputy Administrator, dated 12/21/83.

20. Testimony by Lee Thomas, Administrator of EPA on Acid Deposition before the Committee on Environ-

ment and Public Works, U.S. Senate, December 11, 1985.

Documents 2-19 are privileged as predecisional documents comprising a part of the intra-agency deliberative process.

18b. If the answer to 18 is "Yes," has the Administrator, based on that review, published any determination or proposed determination as to whether revised or new Primary National Ambient Air Quality Standards are appropriate? If so, identify such publication.

No.

* * * *

Dated: March 6, 1986

Respectfully submitted,

/s/ Michael A. McCord
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